JD–67–11
Peoria, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AMERICAN NATIONAL RED CROSS,
HEART OF AMERICA
BLOOD SERVICES REGION

Case Nos. 33-CA-15821
33-CA-15896
33-CA-16144
33-CA-16204
33-CA-16207
33-CA-16229
33-CA-16246
33-CA-16247
33-CA-16248

and

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES (AFSCME),
COUNCIL 31, AFL-CIO

Avavaha Pyrtel and Rotimi Solanke, Esqs.
for the General Counsel.
Michael J. Westcott and Leslie A. Sammon, Esqs., (Axley Brynelson, LLP)
Madison, Wisconsin for the Respondent.
Gail E. Mrozowski, Esq. (Cornfield and Feldman), Chicago, Illinois,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Peoria, Illinois on 7 dates between August 8-16, 2011. AFSCME Council 31, the Charging Party, filed the initial charge on May 29, 2009 and then filed 8 others. The General Counsel issued a complaint on January 28, 2011 and amended it twice, the latest version being issued on July 20, 2011.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party Union I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, the American Red Cross, Heart of America Region (HOA), is an unincorporated operating unit of the American National Red Cross (ANRC). It is one of 36 blood services regions of the ANRC. The 650 local chapters of the ANRC, which are social service organizations, are separate and distinct from the blood services regions.

Respondent is engaged in collecting blood products from donors and distributing blood to health care institutions. Its headquarters are in Peoria, Illinois. Respondent annually derives gross revenues in excess of $250,000 and sells and ships goods from Peoria valued in excess of $50,000 to points outside the State of Illinois. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Procedural Background

The Union filed a representation petition on March 21, 2007. After a hearing, the Regional Director issued a Decision and Direction of Election scheduling a representation election for June 1, 2007 and finding the following unit appropriate:

> All full-time, part-time, and per diem collections specialists I, collections specialists II, collections technicians I, collections technicians II, mobile unit assistants I, mobile unit assistants I/collections specialists I, mobile unit assistant I/collections technicians I, mobile unit assistants I/CTI-HH, mobile unit assistants II, mobile unit assistant II/collections specialists I, mobile unit assistants II/CTI-HH, mobile unit supply clerks, collections assistant, and team leaders employed by the Employer in its Donor Services department, EXCLUDING office clerical and professional employees, guards and supervisors as defined in the Act, and all other employees.

Respondent requested review of the Regional Director's decision that team leaders were not statutory supervisors. The Board granted this request. However, the Board denied Respondent's request that the election be postponed.

The representation election was conducted as scheduled on June 1, 2007. All the ballots were impounded pending resolution of Respondent's request for review. The Board issued a

decision on September 1, 2010 affirming the decision of the Regional Director. Not until September 16, 2010 were the ballots tallied. 112 were cast for the Union; 48 were cast against the Union. Respondent filed objections to the conduct of the election which were overruled by the Regional Director. On October 7, the Union was certified as the exclusive collective bargaining representative of Respondent's employees in the bargaining unit.

Respondent filed a Request for Review of the Regional Director's October 7, 2010 Decision. On October 12, the Union requested that Respondent bargain with it; Respondent refused. The Union filed a charge, 33-CA-16139, on November 12, 2010, alleging that Respondent's refusal to bargain with it violated Section 8(a)(5). The Board denied Respondent's request for review of the Regional Director's decision on December 15, 2010. On December 28, the General Counsel issued a complaint in case 33-CA-16139.

On January 7, 2011, Respondent informed the Union that it was recognizing it as the bargaining agent for the unit. The Union and Respondent settled case 33-CA-16139 on January 21, 2011. Under the terms of the agreement, Respondent and the Union agreed that the certification year would be extended to January 7, 2012 and the first bargaining session would be held no later than February 28, 2011. The Union then withdrew the charge in that matter.

This case involves a number of unilateral changes in the wages, hours and working conditions of bargaining unit employees which are alleged to have been implemented in violation of Section 8(a)(5) and (1) of the Act. Some of the alleged changes were implemented between June 1, 2007 and October 7, 2010 and a few afterwards. This case also involves an alleged failure by Respondent to timely furnish the Charging Party Union information which it requested from the Employer. Finally, the General Counsel alleges that Respondent failed and refused to bargain in good faith with the Union between October 7, 2010 and May 9, 2011.

The parties have had bargaining sessions on the following dates in 2011 during the time period in which the General Counsel alleges an overall failure to bargain in good faith: February 27, March 14, April 10, April 25 and May 9. Since then the parties have also had bargaining sessions on May 23, June 20, June 22, June 30, July 5, July 11 and August 3. At the time the instant hearing closed on August 16, bargaining sessions were scheduled for August 17 and 24.

Alleged Violative Unilateral Changes

Complaint paragraph 6A

On about April 2, 2009, Respondent, pursuant to a national policy emanating from Red Cross headquarters in Washington, suspended making matching contributions to employees' 401(k) accounts for its fiscal year 2010 (July 1, 2009-June 30, 2010). It also suspended giving merit pay increases to employees, and closed its defined benefit pension plan to new employees. In October 2010 (Fiscal Year 2011), unit employees received a lump sum payment of 3% of their base salary in lieu of a merit pay increase. This differed from prior practice in that the lump sum payment did not increase the base pay of the employees. Pursuant to the merit increases, employees received an increase in their base pay predicated on their annual performance reviews. For fiscal year 2010, Respondent's employees received neither a merit increase nor a lump sum payment.

In August 2011, the American Red Cross reinstituted the matching contribution to the 401(k) plan and merit pay increases. However, with regard to unit members at HOA, Respondent did not rescind the 2009 change and return to pre-2009 status quo with regard to merit pay. Instead it offered to bargain with the Union over merit pay as part of reaching agreement on a collective bargaining agreement, G.C. Exh. - 89.

Respondent also announced changes to employee health benefits. On May 8, 2009, the Union made a bargaining demand to Respondent regarding these changes. It received no response. With regard to all these changes, Respondent did not notify the Union in advance nor did it offer the Union an opportunity to bargain prior to implementation.

Prior to the changes in health insurance, employees could choose from a number of different health insurance plans during an annual open enrollment period. One of these plans was associated with the John Deere Company. Beginning in 2010 Employees' choices were limited to one of two plans offered by Blue Cross/ Blue Shield. One of these plans was a preferred provider plan (PPO); the other was an Exclusive Provider Plan (EPO). The EPO had lower premiums but provided for the payment of no benefits to providers which were not part of the plan's network.

Additionally, effective January 1, 2010, any employee whose spouse could be covered by another employer's medical insurance was required to pay an additional $100 per month to retain coverage of the spouse under Respondent's health care plan.

I find that Respondent violated Section 8(a)(5) with respect to all of these changes. Respondent's defense to most of them is that it was not obligated to bargain with the Union prior to the tally of the ballots and was therefore privileged to make unilateral changes in the terms and conditions of unit members' employment. It also argues that many of these changes were established past practices and thus reflected status quo. Finally, Respondent argues that it did not have any discretion with regard to the implementation of changes initiated by the ANRC.

Employer's obligations while objections to the conduct of an election or ballot challenges are pending.

Board law regarding an employer's unilateral changes during the period in which objections to the conduct of the election or ballot challenges are pending was summarized as follows in *Palm Beach Metro Transportation, LLC,* 357 NLRB No. 26 (July 26, 2011):

> It is well settled that unilateral decisions made by an employer during the course of a collective-bargaining relationship concerning matters that are mandatory subjects of bargaining are generally regarded as a refusal to bargain. *NLRB v. Katz,* 369 U.S. 736 (1962). An employer's duty to bargain only arises, however, if the changes are material, substantial, and significant ones affecting terms and conditions of employment *Millard Processing Services,* 310 NLRB 421, 425 (1993). Absent "compelling economic considerations", an employer "acts at its peril" by unilaterally changing working conditions during

> the pendency of election issues and where the final determination has not yet been made. And where the final determination on the objections results in the certification of representative the Board will find the employer to have violated Section 8(a)(5) and (1) of the Act for having made such unilateral changes *Mike O'Connor Chevrolet,* 209 NLRB 701 (1974), *enfd. denied on other grounds, NLRB v. Mike O'Connor,* 512 F.2d 684 (8th Cir. 1975). The Board in *Mike O'Conner Chevrolet,* supra at 703 explained, "Such changes have the effect of bypassing, undercutting, and undermining the union's status as the statutory representative of the employees in the event a certification is issued. To hold otherwise would allow an employer to box the union in on future bargaining positions by implementing changes of policy and practice during the period when objections or determinative challenges to the election are pending."

Accord, Alta Vista Regional Hospital., 357 NLRB No. 56 (August 2, 2011).

Respondent argues that the *Mike O'Conner* line of cases is based on an assumption that the Employer is aware of the election results or otherwise has evidence that the union has majority support at the time it acts. This is simply incorrect. The Board has applied the *Mike O'Conner* in cases in which an Employer is merely challenging the conduct of the election, e.g., *Farina Corp.,* 310 NLRB 318 (1993) and in cases in which the final results of the election are in doubt due to ballot challenges. The only thing that distinguishes the instant case from similar cases that the Board has decided is the length of time between the election and the certification, and the fact that no ballots were counted for over three years. However, I conclude that this is immaterial.

In *Mike O'Conner Chevrolet,* the election was held on March 27, 1973. 8 votes were cast in favor of the Union, 6 against and 3 were challenged. Not until the Board issued its decision almost a year later on March 14, 1974 was the Union certified. In *Overnite Transportation Co.,* 335 NLRB 372, 373 (2001), the election was held on September 16, 1996. 219 votes were cast for the Union; 201 against, with determinative challenged ballots. The Union was not certified until October 9, 1997, 13 months later. The Board found that a unilateral change in company loading dock policy that occurred in April 1997 violated Section 8(a)(5) and (1).

In *Mike O'Conner* and *Overnite* it was possible that after the challenged ballots were counted, the Union would have lost the election and thus Respondent would not have been required or allowed to bargain with it. If that were not the case there would have been no need to count the challenged ballots. Nevertheless, as the Board found, these employers ran the risk that the Union would be ultimately certified when it implemented their unilateral changes. In this case, the equities for such a result are even clearer since it was Respondent's unsuccessful challenge to the ballots of the team leaders that was responsible for the long delay in certification in a unit in which the employees overwhelming favored union representation.

Alleged Unilateral Changes before and after the commencement of bargaining; Respondent's established past practices and lack of discretion defenses with regard to these changes

General Principles

When negotiating a collective bargaining agreement with the authorized representative of its employees, an employer is obliged pursuant to Section 8(a)(5) of the Act to maintain the status quo with regard to mandatory subjects of bargaining, *NLRB v. Katz,* 369 U.S. 736 (1962); *Our Lady of Lourdes Health Center,* 306 NLRB 337 (1992). During negotiations, an employer's obligation to refrain from unilateral changes in the wages, hours and other terms and conditions of employment of bargaining unit employees extends beyond the duty to provide notice to the Union and an opportunity to bargain about a subject matter. It encompasses a duty to refrain from implementing such changes at all, absent overall impasse on bargaining for the agreement as a whole, *Bottom Line Enterprises,* 302 NLRB 373 (1991).

There are exceptions to this general rule. One is the "long-standing practice exception." This exception is based on the recognition that certain unilateral changes do not interfere with collective bargaining because they represent the status quo, *Queen Mary Restaurants Corp. v. NLRB,* 560 F.2d 403, 408 (9th Cir. 1977); *The Courier Journal* 342 NLRB 1093 (2004) n. 1. Thus, an employer must make changes that constitute past practices which inure to the benefit of employees, such as granting periodic wage increases, *Jensen Enterprises,* 339 NLRB 877 (2003). However, an employer is also privileged to make changes that adversely effect employees, such as increasing their contributions to their health insurance premiums, at least when such changes occur a regular intervals and the change is consistent with past increases, *Post-Tribune Co.,* 337 NLRB 1279 (2002).

Employers may also implement unilateral changes when a union engages in tactics designed to delay bargaining. Additionally, when economic exigencies compel prompt action, an employer may be entitled to implement such unilateral changes. However, even when "economic exigencies compelling prompt action" justify unilateral changes, the employer must provide the union adequate notice and an opportunity to bargain, *RBE Electronics of S.D.,* 320 NLRB 80, 82 (1995).

Respondent herein argues that it was privileged to suspend the employer match to the 401(k) plan, terminate new employee participation in the Red Cross retirement system and make changes in health insurance benefits because these were changes made by the Red Cross at the national level. Further Respondent contends that it had an established past practice of instituting whatever changes were made to these benefits by the national Red Cross. I reject this argument.

The American National Red Cross made unilateral changes to these benefits, which it is privileged to make absent a collective bargaining obligation. However, it is not correct to say that Respondent is entitled to make a unilateral change in terms and conditions of employment of its employees simply because ANRC may make such a change with respect to unorganized employees of other divisions or chapters.

The status quo for employees at HOA was that they would receive a matching contribution to their 401(k), etc. In light of Respondent's HOA's bargaining obligation, it was obligated to bargain with the Union regarding any change to the status quo. The only exception to such an obligation would be one in which *HOA employees* had reason to believe that there would a regularly occurring change to the terms and conditions of their employment implemented pursuant to objective criteria, *Goya Foods of Florida,* 347 NLRB 1118, 1120 (2006); *Eugene Iovine, Inc.,* 328 NLRB 294 (1999).

Respondent has not established that it was required to implement these benefit changes. Just as the ANRC job description standardization initiative did not apply to organized regions in the middle of negotiations, Tr. 969, Respondent has not established that the benefits changes could not have been negotiated.[1] Moreover, these benefit changes were precisely the sort of issues that lend themselves to collective bargaining. The Union could, for example, have traded retention of the 401(k) match for concessions to Respondent on other issues.

Complaint paragraph 6B

Prior to April 2009, there were approximately 30-40 unit employees classified as team leaders. During blood drives one of these employees monitored 4-5 other unit employees in the performance of their duties. In April 2009, without prior notice to the Union, about 17 of these employees became team supervisors. This removed them from the bargaining unit. The rest of the team leaders were deprived of their monitoring function when working on blood drives in which the goal was to obtain blood from 25 or more donors. The team supervisor position was new in 2009. Although there were employees prior to that time with the title of team supervisor, this was not the same position.

After April 2009 the team leaders no longer filled out reports on the drives to which a team supervisor was assigned. Prior to the April 2009, they had completed these reports. The promotion of some team leaders to team supervisor and the change in the duties of the team leaders was implemented by the American Red Cross throughout the country.

The Union protested this change alleging that it was motivated by a desire to remove team leaders from the bargaining unit. It demanded that Respondent cease and desist from making these changes.

[1] The instant case is distinguishable from *American Red Cross, Blood Services, Connecticut Region,* JD(NY) 28-11 (2011) in that herein there is no contract acknowledging the right of the ANRC to unilaterally make changes in the 401(K) and Retirement Systems that affects unit employees.

In *American National Red Cross, Great Lakes Blood Services Region and Mid-Michigan Chapter,* JD 27-11 (2011) Judge Wedekind distinguished various alleged unilateral changes to the employer's 401(k) and pension plans in accordance with the language of the parties' expired contracts. In those situations in which the language of the expired contract did not mandate adherence to the amended ANRC 401(k) and retirement plans, Judge Wedekind found the employer to be in violation of Section 8(a)(5) in making unilateral changes to these plans as they affected unit employees.

Currently, the former team leaders have the title of Collections Specialist II. In Respondent's Whole Blood Department, they report to a Collections Team Supervisor. In the Aspheresis (Platelet) Department they report to a Collections Manager or Operations Supervisor.

It is a violation of Section 8(a)(5) to unilaterally promote an unit employee to a supervisory position if that employee continues to perform unit work. Such a personnel action in effect changes the status quo by taking unit work away from the bargaining unit, *Suzy Curtains, Inc.,* 309 NLRB 1287, 1289 (1992). Thus, the issue with regard to this complaint allegation is not so much whether the remaining team leaders were no longer doing unit work but rather whether the newly promoted team supervisors were performing unit work. I find that this is so and that Respondent violated the Act by promoting the team leaders to supervisory positions and having them perform what had heretofore been bargaining unit work.[2]

Complaint paragraph 6C

In September 2010, Respondent unilaterally made changes in the job titles of certain unit employees. For example, Mobile Unit Supply Clerks became Supply Assistants. There is no evidence that there was a change in the pay or duties of any of the employees whose titles were changed. The General Counsel has also failed to demonstrate that this change could have a material impact on unit employees in the future.

These changes are part of an ANRC job standardization plan, which was initiated after the June 1, 2007 representation election in Peoria. At other unionized locations, this plan was subject to bargaining with the employees' collective bargaining representatives. It was not implemented unilaterally as it was by HOA. Nevertheless, I find that it has not been established that these changes were material alterations in the terms and conditions of unit members' employment and dismiss this complaint allegation.

Complaint paragraphs 6D and E

In early February 2011, after recognizing the Union, Respondent unilaterally changed the responsibilities of unit employees with regard to the loading and unloading of the Employer's vehicles. Prior to February 2011, this work was performed by Mobile Unit Assistants;

[2] Respondent has not established that it was required to comply with the ANRC policy on assigning supervisors to blood drives in which 25 or more donors were expected. Anna Shearer testified that all regions were expected to comply and that they did not have a choice, Tr. 953. However, Respondent's Biomedical Services Compliance Plan, Exh. R-148, states at page 9 that, "Local operating procedures (LOPs) are appropriate only in very limited circumstances, such as when dictated by state law." This leaves open the possibility that an LOP regarding the assignment of supervisors may also be appropriate when dictated by the requirements of the NLRA.

The addendum to the Compliance Plan at page 19 states that "the desired state" is to implement a standard structure for supervisors with adequate supervisory time to work with their assigned staff. One of the ways in which this "desired state" is to be achieved is to "gradually increase full time supervision to blood mobiles over the size of 25." I conclude that this leaves open the possibility of negotiating with the Union an alternative to removing employees from the bargaining unit.

afterwards the work was performed by General Services Supply Clerks.[3] The Mobile Unit Assistants are the employees who drive Respondent's vehicles to the site of blood drives and then perform other duties at that location. The Supply Clerks' duties are performed at Respondent's Peoria Headquarters.

This change required some adjustments in the working hours of unit employees. It was apparently implemented by the Mid-America Division of the Red Cross' Blood Services Operation and not only at HOA.

One Supply Clerk, Jake Irions, has to report to work several hours earlier, sometimes as early as 3 a.m., instead of 6 a.m., as he did prior to the change. He also works every weekend, which he did not do prior to February 2011. Additionally, the change resulted in a reduction of as much an hour in the daily working hours of the mobile unit assistants.

When the Union learned of these proposed changes in late January it demanded that Respondent bargain over the proposed changes. Respondent implemented the change in truck loading duties without bargaining and has refused to rescind the change.

Between approximately March 20 and April 18, 2011, some of this loading/unloading was also performed by two warehouse employees who are not members of the bargaining unit. These two employees ceased loading/unloading trucks about 10 days after the Union complained about this practice, G.C. Exh. 28. A week before the hearing in this matter, on August 5, the task of unloading the trucks was returned to the mobile unit assistants. However, loading of the trucks at the Peoria headquarters is still the responsibility of the Supply Clerks.

Respondent argues that these changes are not material in part because only one employee, Jake Irions, experienced any significant change in the terms and conditions of his employment. However, the Board has held that a material unilateral change affecting one employee violates Section 8(a)(5), *Carpenters Local 1031,* 321 NLRB 30, 321 (1996). This change affected both MUAs and supply clerks in a significant way. Requiring Jake Irions to come to work at 0300 rather than 0600 and requiring him to work weekends is an obvious material change to the terms and conditions of his employment. MUAs lost as much an hour of paid work time daily as a result of the change. Thus, Respondent in making the changes to the hours and duties of the MUAs and Supply Clerks clearly violated Section 8(a)(5).

Contrary to Respondent's position, it is not sufficient for it to offer to bargain about its unilateral changes in contract negotiations. An employer is required to rescind such changes and bargain in good faith regarding a collective bargaining agreement.

Complaint paragraph 6F

Effective January 1, 2011, the amount of unused hours of personal time off (PTO) which employees in ARC's Mid-America Division were allowed to carry over to the following calendar year was reduced from 160 hours to 120 hours. Respondent's PTO includes vacation time, sick

[3] The official titles of these employees appear to change constantly. For example, the supply clerks are now apparently called kitting specialists.

leave and any other absence from work for personal reasons. This change was implemented without prior notice to the Union and without providing the Union an opportunity to bargain.

At HOA some employees were apparently paid for PTO on days that they worked so that the change has not, at least as of yet, affected them financially. However, 5 HOA employees have been "affected" by the change, which I infer means they lost PTO hours for which they were not compensated.

Upon learning of this change from unit members, the Union demanded that Respondent rescind the change and bargain over it. Respondent has not rescinded the change. It argues that the change is not material in part because so far only a few employees forfeited PTO hours. However, I conclude that the forfeiture of leave hours is clearly material both with regard to the handful of employees who have already forfeited such hours and with regard to those who may do so in the future.

Respondent also contends that this allegation is time barred under the 6-month limitation for the filing of charges in Section 10(b) of the Act. The Union filed a charge with regard to the reduction in PTO carryover on February 25, 2010, less than two months after it was implemented. Respondent had notified unit employees in September 2009 that the PTO policy would change in 2010 and briefly mentioned it in an employee meeting in August 2010. However, Respondent did not notify the Union of this change more than six months before the filing of the charge, Tr. 418. Respondent has not met its burden of showing that the Union had "clear and unequivocal notice of the violation outside the 10(b) period," *Broadway Volkswagen,* 342 NLRB 1244, 1246 (2004). Notice to unit employees did not provide such notice to the Union. Moreover, the 10(b) period begins to run only when the unfair labor practice occurs, in this case on January 1, 2011, well within six months of the Union's charge, *Leach Corp.,* 312 NLRB 990 (1993). I find that this change violates Section 8(a)(5).

Complaint paragraph G

On several occasions since Respondent recognized the Union, non unit employees have performed bargaining unit work. On March 11, 2011, Sara Schwarzlose, an instructor/trainer, obtained double red cells from a donor. On March 16, Linda Walker, also an instructor/trainer, performed the same task. On April 11, two supervisors, Kahla Crackel and Sophia Frederick performed unit work during a blood drive. On March 11, and April 23, 2011, Rachel Jaskula, a team supervisor, did the same thing. At an April 25, bargaining session, Respondent promised that non-unit employees would not perform unit work. However, on June 30, Shelby Jackson, a non-unit trainer, drew blood from a donor. Team Supervisors on occasion drew blood from donors prior to March 11.

Respondent argues that this complaint allegation should be dismissed for several reasons. First it argues that there is no evidence that these instances were a departure from past practice. However, the burden is on Respondent to prove that the work of the supervisors was consistent with past practice, *Eugene Iovine,* 328 NLRB 294 n. 2 (1999). It did not do so.

Respondent also argues that this allegation should be dismissed because there is no evidence as to the reason the team supervisors were doing what normally would be considered

unit work. However, the issue here is a subset of the past practice issue. If the team supervisors were performing unit work for reasons that were consistent with Respondent's past practice, i.e., to maintain clinical competencies, it was Respondent's burden to establish this fact. It did not; thus I find that Respondent violated Section 8(a)(5) as alleged.

Alleged failure to timely furnish information requested by the Union, Complaint paragraph 7(c)

Information regarding medical insurance benefits

On January 27, 2011, the Union requested that Respondent furnish it with a list of all bargaining unit employees, their address, phone number, job classification or title, rate of pay, date of last hire, dates of any previous employment with the Red Cross and work schedule. It also requested a copy of any written policies and procedures as they relate to wages and other compensation, hours and working conditions, including any personnel handbook or manual and "any documents the purpose of which is to explain the benefits received by employees," G.C. Exh. 11. The complaint alleges in paragraph 7(c) that Respondent has failed to furnish the documents explaining employee benefits in a timely fashion. This allegation is duplicative of complaint paragraph 8(b)(8). Thus, my disposition of paragraph 7(c) also applies to 8(b)(8).

On February 16, 2011, Respondent provided the Union with a number of documents in response to this request, Exh. R-3. Among those documents was its employee handbook which very generally describes the benefits it provides. Two months later, the Union complained that this response was inadequate with regard to health insurance benefits. On April 25, Respondent provided the Union with a summary of health insurance benefits which set forth the premiums to be paid, but did not provide documents which set forth the details of what the health insurance plans covered, Exh. R-37. The Union representatives did not look at this document or indicate in any way to Respondent that it was inadequate, Tr. 288-90, 308-10.

At the July 11, 2011 bargaining session, the Union specifically asked HR Director Michelle Agnew for health plan summaries, information on deductibles and co-pays. Agnew provided this information that evening, R. Exh. 170. I find that the Union did not inform Respondent that the April 25 summary was inadequate prior to July 11.

As the General Counsel and Union point out, there are cases in which the Board has found as little as a 2 ½ month delay in providing information to violate Section 8(a)(5). However, there is no per se rule and I conclude one must examine the overall context of the requests and the responses. The Union's requests were broad and, with regard to benefits, imprecise. However, one could argue that Agnew should have been able to infer that the Union wanted more information than she provided in February and April.

Nevertheless, I find that the delay with regard to health insurance benefits does not rise to the level of a statutory violation. The Union had ample opportunity to inform the Respondent that it had not satisfied its request for information before July 11. The record indicates that if it had told the Respondent that it wanted the health plan documents, they would have been provided in a timely fashion.

Also, the parties had not started bargaining over economic issues during the delay and there is nothing to indicate that the Union was hindered by the delay in preparing its economic proposals. Therefore, I dismiss the complaint allegation that Respondent violated Act by delaying its response to the Union's request for information regarding employee medical insurance benefits.

Information requests regarding employee discipline

Additionally, the Union has requested on several occasions, starting with the February 27 bargaining session, that Respondent provide it with copies of any discipline received by unit employees and documents supporting such discipline, since the Union was certified on October 7, 2010. The Union made a written request for this information on April 14. The Union on several occasions has told Respondent that it would provide Respondent with the names of employees that the Union knew of who had been discharged. Nevertheless, Respondent has not provided to the Union any information it has regarding the discharge and discipline of any employees.

With regard to this allegation, I find that Respondent violated the Act. The fact that the Union indicated that it knew the names of some employees who had been disciplined and or terminated does not excuse the Respondent's failure to respond to the request, *King Soopers, Inc.,* 344 NLRB 842, 844 (2005); *New York Presbyterian Hospital,* 354 NLRB No. 5, slip opinion at page 8 (2009). "The Board has held that the union may not be subjected to a burdensome procedure of obtaining desired information where the employer has the information in a more convenient form," *Chesapeake and Potomac Telephone Company,* 259 NLRB 225, 230-32 (1981) enfd. 687 F.2d 633 (1982).

Although Respondent contends, very generally, that it would have been burdensome for it to comply with the request, there is no indication that it made any effort to do so. For example, there is no indication that it checked personnel records or polled its supervisory staff. Respondent is obligated to make reasonable efforts to comply with the Union's request and, if there is still a claim of undue burden, attempt to reach some accommodation with the Union so that the information is supplied, *Ibid.* I conclude Respondent has violated the Act in failing to provide the Union with the information it requested about unit employee discipline.

Alleged Violations during bargaining, Complaint paragraphs 8B & 8C

The allegations contained in Complaint paragraph 8B & 8C emanate from an amendment to charge 33-CA-16246, which was filed by the Union on May 25, 2011, two days after the parties' sixth bargaining session. Many of the specific allegations overlap and others are duplicative of allegations contained in other paragraphs of the complaint. Those that are duplicative are not discussed below. In paragraph 8C, the General Counsel alleges that by its overall conduct set forth in paragraph 8B, Respondent has failed and refused to bargain in good faith with the Union through May 9, 2011.

Thus, the General Counsel contends that when you consider all the specific allegations together, they indicate that Respondent was determined not to reach agreement with the Union and was engaging in surface bargaining. I conclude that the General Counsel has not established

such an overall intent. Moreover, as discussed below, I dismiss several of the specific allegations.

Limiting the dates available for bargaining sessions; limiting the frequency of bargaining sessions; refusing to meet and confer at appropriate times; cancelling agreed upon bargaining dates.

On January 24, 2011, three days after the Union and Respondent settled Case 33-CA-16139, Attorney Charles Pautsch contacted the Union by telephone and informed the Union's Regional Director, Kent Beauchamp, that he would be Respondent's lead negotiator. They discussed scheduling bargaining sessions on February 23 and 24, 2011. Respondent would not agree to allow employees to attend bargaining sessions when they were scheduled to work.

On January 30, Pautsch agreed to meet on February 23 at 2:00 p.m. However, on receipt of a list of the members of the Union's bargaining committee, Pautsch informed Beauchamp that Respondent could not take that many people off the daytime work schedule. The committee consisted of 10 employees, 5 of whom were team leaders and 2 who were mobile unit assistants. Pautsch suggested that the Union either reduce the size of the bargaining committee or rotate its attendees at the bargaining sessions.

Pautsch also suggested an evening bargaining session on February 23, 24 or 25 or meeting on Saturday, February 26. One of the reasons that the parties did not meet on the evening of February 23, was that Beauchamp had another collective bargaining commitment. Pautsch offered to start a session on February 24 at 9:00 p.m.; Beauchamp rejected this.

After a further exchange of emails, Pautsch and Beauchamp agreed to meet on February 27, March 4, March 7, and March 14 at 6:00 p.m. Then on February 6 and 9, Pautsch informed the Union that he had a conflict on March 4 and that his client had a conflict regarding March 7. The parties agreed then to meet on February 27, March 14, and March 21.

The parties met on February 27 and March 14. At the March 14 meeting the parties agreed to meet on April 10, April 25, May 9 and May 23, (Tr. 141-142). The March 21 date was intended as a replacement for the March 4 date. Union negotiator Beauchamp cancelled the March 21 session due to illness.

The parties met, as scheduled on April 10, April 25, May 9, and May 23, 2011. At the end of the April 10 meeting Beauchamp handed Pautsch a letter that he had prepared in advance, G.C. Exh. 31. It stated that the frequency and duration of bargaining sessions must increase if the parties were to meet their respective duties to bargain. The Union indicated its availability on 3 dates in April in addition to those previously scheduled and 12 additional dates in May.

Beauchamp and Pautsch then traded accusations as to which was responsible for the slow pace of negotiations. Pautsch offered to continue bargaining on April 10. Beauchamp replied that the Union could not continue bargaining that night because several committee members had to report to work early the next morning.

On April 25, the Union again requested bargaining sessions in May, in addition to those already scheduled. Respondent said it was not available for additional meetings in May. As stated before, the Union filed an amended charge two days after the May 23 meeting alleging, among other things that Respondent had failed to bargain with it in good faith by limiting the dates available for bargaining, G.C. Exh.-1 (pp).

Since then the parties have also had bargaining sessions on June 20, June 22, June 30, July 5, July 11 and August 3, 2011, and had scheduled additional sessions after the close of the instant hearing on August 16, 2011. The complaint alleges a violation regarding the limiting of bargaining sessions only through May 9.

Limiting the length of bargaining sessions

The parties met on February 27, 2011 from about 6:00 p.m. to 8:30 p.m., and adjourned by mutual agreement. The Union presented a few non-economic contract proposals; Respondent presented none.

The parties met again on March 14, 2011 at which time they agreed to meet on April 10, April 25, May 9 and May 23. Union negotiator Kent Beauchamp asked if bargaining sessions could begin at 4:00 p.m. rather than 6:00. He told Respondent that the 6:00 p.m. start limited bargaining because some of his committee members had to start work for Respondent very early the next morning. Beauchamp suggested that if all the committee members were off work on the day of the bargaining session, the parties could start earlier and bargain longer. Pautsch replied that Respondent could not take all the members of the committee off its work schedule. The March 14 session lasted about 3 hours.

The parties' third session occurred on April 10, and ran from 6:00 to 9:00 p.m. At this session Beauchamp complained to Respondent that both the frequency of bargaining sessions and their length were inadequate. After arguing about who was at fault, Pautsch offered to continue the session past 9:00. Beauchamp declined because some of his committee members had to be at work very early the next morning. Beauchamp asked that all committee members be kept off Respondent's work schedule for one day so that the parties could bargain longer; Respondent refused.

The fourth bargaining session took place on April 25. At this session the parties exchanged proposals. The session last 3 hours. During this session, Pautsch suggested a 4:30 p.m. start for sessions scheduled for June; he later suggested a 4:00 start.

The parties started their 5th session at 6:00 on May 9. Respondent submitted additional proposals, including one which provided that it would discharge an employee only for just cause and providing for a progressive discipline policy—with exceptions. The Union then posed numerous questions to Respondent about its April 25 proposals. On one point, Pautsch told the Union it would not provide it information regarding prior discipline, but would provide such information prospectively. The May 9 session lasted 3 ½ hours.

Analysis

One of the principal reasons that the parties met only five times between February 27 and May 9, and met for only several hours at a time was the size of the employee component of the Union's bargaining committee. Respondent stated it could not leave all these employees off its work schedule. The General Counsel and the Union have failed to demonstrate that this position was unreasonable, see *Whitesell Corp.,* 357 NLRB No. 97 (September 30, 3011) at slip opinion page 27. Additionally, neither the General Counsel nor the Union has demonstrated why the presence of 10 members was essential at every meeting. They have also not shown why bargaining sessions could not have continued after those employees scheduled for work the next day went home. On this basis, I find that Respondent did not violate the Act either in limiting the number of bargaining sessions, etc., or in limiting the duration of these sessions.

Refusing to bargain over employee discipline

This allegation refers in part to requests by the Union to be present at meetings at which employees Shonda Sledge and Cory Tatroe were terminated by Respondent in December 2010, and to bargain over their terminations. Respondent refused these employees the right to union representation on the grounds that the meetings in question were termination meetings, not investigatory meetings. In addition to its general bargaining demand of October 2010, the Union specifically demanded bargaining over employee discipline on December 16, 2010, Exhs. G.C. 6 & 7. Respondent violated the Act as alleged. I note, however, that neither the General Counsel nor the Union has requested rescission of any disciplinary measures taken by Respondent.

Making unilateral changes in the terms and conditions of unit employees' employment

In addition to the unilateral changes already discussed and analyzed herein, some of the unilateral changes in this record have been rescinded and are now moot. I do not see the need to address therefore whether or not they violated the Act.

In addition to the changes previously mentioned, the Union demanded that changes in Respondent's meal break policies for supply clerks that had been implemented unilaterally be rescinded and that Respondent bargain over such changes with it. On February 14, 2011, management had informed the supply clerks that they could not take a meal break if any truck was waiting to be loaded and threatened disciplinary action for noncompliance, G.C. Exh. 66. Previously, the supply clerks had taken their meal break half way through their shift. The record indicates that this problem has been resolved.

The Union also alleged that Respondent was not complying with an Illinois State Law that required a 20 minute meal break for any employee who worked 7.5 hours continuously and demanded compliance with the statute. This issue also appears to be moot.

Respondent's alleged refusing to explain its bargaining proposals

I find there is no evidence to support this allegation.

Respondent's alleged delay in providing the Union with bargaining proposals

On February 27, Respondent did not submit any contract proposals to the Union. The Union presented a few non-economic proposals to the Respondent. On March 14, HOA submitted only two counter proposals to those proposed by the Union: one of which shortened the preamble to the collective bargaining agreement and the second defining a grievance as an alleged violation of the express terms of the agreement. The parties also tentatively agreed on ground rules proposed by Respondent for the negotiating sessions.

The April 10 session was scheduled for 6:00, but did not start until 6:30 after Respondent's negotiating team caucused. After another caucus by both parties which ended at about 8:00 p.m., Respondent made additional contract proposals to the Union. These include a proposed grievance procedure and savings clause for the contract.

On April 25, Respondent presented a number of proposals to the Union. These included hours of work, management rights, seniority, a "zipper" clause, an "open shop" provision and a no strike/no lockout article. HOA's attorney Pautsch "walked through and explained" Respondent's proposals on seniority, hours of work and overtime.

Respondent submitted additional proposals at the May 9 bargaining session. These included articles regarding the intent of the agreement, non discrimination, definitions of full time, part time and temporary employees, job postings, lay-off and recall, discipline and discharge and the term of the agreement. The Union did not submit any proposals at this session. I conclude that the record does not establish that Respondent violated the Act as alleged in paragraph 8(b)(10).

Summary of Conclusions of Law

Respondent, the American Red Cross, Heart of America Region violated Section 8(a)(5) and (1) of the Act by:

(a) Unilaterally changing the terms and conditions of employment of bargaining unit members by:

(1) Discontinuing its matching contribution to unit employees' 401(k) plan contributions;

(2) Suspending employees' merit pay increases;

(3) Closing its defined pension plan to new employees;

(4) Announcing and making changes to its health insurance benefits;

(5) Promoting team leaders to team supervisor and having them continue to perform bargaining unit work;

(6) Reassigning truck loading and unloading assignments from the Mobile Unit Assistants to the General Supply Clerks;

(7) Decreasing the number of personal time off (PTO) hours an employee can carry-over from year to year from 160 hours to 120 hours;

(8) Assigning or otherwise authorizing non-unit employees to perform bargaining unit work, such as drawing blood from donors.

(9) Failing or refusing to bargain with the Union concerning the discipline of unit employees.

(b) Failing to provide the Union with information it requested regarding unit employee discipline and discharge.

Remedy

Having found the Respondent to have engaged in certain unfair labor practices, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, I shall order the Respondent to rescind the unlawful unilateral changes made to unit employees' terms and conditions of employment, and to restore the status quo ante that existed prior to the changes until such time as it bargains with the Union in good faith to a collective bargaining agreement or bona fide impasse.

` Respondent shall make whole any unit employees affected by the unilateral unlawful changes. Such compensation shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). It shall also make any benefit contributions on behalf of eligible unit employees that have not been made since the date of unlawful changes.

I shall also order Respondent to provide the Union with the information it requested regarding the discipline and discharge of unit employees, and to post a notice to its employees regarding the violations in accordance with *J. Picini Flooring,* 356 NLRB No. 9 (2010).

Finally, I recommend that pursuant to the Board's decision in *Mar-Jac Poultry,* 136 NLRB 785 (1962) Respondent be required to honor the Union's certification for a six-month period commencing from the date upon which it rescinds all of its illegal unilateral changes. These changes have undercut and undermined the Union's status as the statutory representative and Respondent should be required to bargain in good faith for a substantial period during which the damage done to the Union's status has been negated.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, American Red Cross, Heart of America Region, Peoria, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the terms and conditions of employment of bargaining unit members by:

(1) Discontinuing its matching contribution to unit employees' 401(k) plan contributions;

(2) Suspending employees' merit pay increases;

(3) Closing its defined pension plan to new employees;

(4) Announcing and making changes to its health insurance benefits;

(5) Promoting team leaders to team supervisor and having them continue to perform bargaining unit work;

(6) Reassigning truck loading and unloading assignments from the Mobile Unit Assistants to the General Supply Clerks;

(7) Decreasing the number of personal time off (PTO) hours an employee can carry-over from year to year from 160 hours to 120 hours;

(8) Assigning or otherwise authorizing non-unit employees to performing bargaining unit work, such as drawing blood from donors;

(9) Failing and/or refusing to bargain with respect to the discipline of unit employees.

(b) Failing to provide the Union with information it requested regarding unit employee discipline and discharge.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) On request, rescind the unlawful unilateral changes it made to the terms and condition of unit employees' employment and restore the status quo ante that existed prior to the changes until such time as it has bargained with the Union to an agreement or impasse;

(b) Bargain in good faith with the Union as the certified bargaining representative of unit employees for at least six months after it has rescinded its illegal unilateral changes;

(c) Provide the Union with the information it requested with regard to employee discipline and discharge;

(d) Make whole, with interest unit employees for any loss of earnings and benefits they may have incurred as a result of its unlawful unilateral changes, in the manner set forth in the remedy section of this decision.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay or other compensation due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Peoria, Illinois facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Sub Region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2, 2009.

5 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 4, 2011.

_____
Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail to timely provide the Union with information it requested regarding unit employee discipline and discharge.

WE WILL NOT make the following changes in the terms and conditions of your employment without providing AFSCME District 31 an opportunity to bargain over the change. During collective bargaining negotiations WE WILL NOT make such changes prior to negotiating a collective bargaining agreement or negotiating to a valid impasse.

(1) Discontinuing matching contributions to unit employees' 401(k) plan contributions;
(2) Suspending employees' merit pay increases;
(3) Closing our defined pension plan to new employees;
(4) Announcing and making changes to our health insurance benefits;
(5) Promoting team leaders to team supervisor and having them continue to perform bargaining unit work;
(6) Reassigning truck loading and unloading assignments from the Mobile Unit Assistants to the General Supply Clerks;
(7) Decreasing the number of personal time off (PTO) hours an employee can carry-over from year to year from 160 hours to 120 hours;
(8) Assigning or otherwise authorizing non-unit employees to performing bargaining unit work, such as drawing blood from donors.
(9) Failing and/or refusing to bargain with the Union concerning employee discipline.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide AFSCME Council 31 the information it requested concerning the discipline and discharge of bargaining unit employees.

WE WILL, on request rescind the unlawful unilateral changes we have made in the terms and conditions of your employment and will restore the conditions that existed prior to these changes until such time as we have bargained with AFSCME Council 31 to a contractual agreement or to a valid bargaining impasse.

WE WILL make unit employees whole for any loss of earnings and other benefits resulting from our unlawful unilateral changes, less any net interim earnings, plus interest compounded daily.

WE WILL bargain with AFSCME Council 31 as the certified collective bargaining representative of bargaining unit employees for at least six months after the date upon which we have rescinded all of our illegal unilateral changes.

AMERICAN NATIONAL RED CROSS,
HEART OF AMERICA
BLOOD SERVICES REGION

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

300 Hamilton Boulevard, Suite 200, Peoria, IL 61602-1246
(309) 671-7080, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (309) 671-7085.